Tawas Industries, Inc. *and* Margaret Loeffler. Case 7–CA–37101

May 22, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND FOX

On February 1, 1996, Administrative Law Judge Leonard M. Wagman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in response to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Tawas Industries, Inc., Tawas City, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for acting as an officer of, or otherwise supporting or assisting, Tawas Independent Workers Association or any other union.

(b) Enforcing rules prohibiting solicitation or distribution against employees because they act as officers of or otherwise support or assist Tawas Independent Workers Association or any other union.

(c) Suggesting that employees abandon Tawas Independent Workers Association as their collective-bargaining representative, and deal directly with management.

(d) Enforcing and maintaining rules in its collective-bargaining agreement with the Union which prohibit employees from making false statements concerning any employees, Tawas Industries, Inc., its management, its supervisors, or its products.

(e) Enforcing and maintaining in its collective-bargaining agreement with the Union's overly broad rules prohibiting unauthorized solicitation and distribution at all times, including employees' nonworking time.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Margaret Loeffler full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Margaret Loeffler whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility, in Tawas City, Michigan, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 13, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any employee for acting as an officer of, or otherwise supporting or assisting, Tawas Independent Workers Association or any other union.

WE WILL NOT enforce rules prohibiting solicitation or distribution against our employees because they act as officers of or otherwise support or assist Tawas Independent Workers Association or any other union.

WE WILL NOT suggest that our employees abandon Tawas Independent Workers Association as their collective-bargaining representative, and deal directly with us.

WE WILL NOT enforce and maintain rules in our collective-bargaining agreement with the Tawas Independent Workers Association which prohibit employees from making false statements concerning any employees, Tawas Industries, Inc., its management, its supervisors, or its products.

WE WILL NOT enforce and maintain in its collective-bargaining agreement with the Union's overly broad rules prohibiting unauthorized solicitation and distribution at all times, including employees' nonworking time.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Margaret Loeffler full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Margaret Loeffler whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Margaret Loeffler, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

TAWAS INDUSTRIES, INC.

Richard F. Czubaj, Esq., for the General Counsel.
Scott D. Norton, Esq. (Sullivan, Ward, Bone, Tyler & Asher), of Southfield, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge. This case was tried in Tawas City, Michigan, on September 7, 1995. On a charge filed on April 13, 1995,[1] by the Charging Party, Margaret Loeffler, an individual (Loeffler), and an amended charge filed by Loeffler on May 18, 1995, the Regional Director for Region 7 issued the complaint in this case on May 24, 1995, alleging that the Respondent, Tawas Industries, Inc. (Tawas), had engaged in unfair labor practices violating Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The complaint alleges that Tawas violated Section 8(a)(1) of the Act by maintaining rules restricting employee solicitation and distribution, maintaining and enforcing a rule restricting employee statements, and by suggesting that employees bypass their union, Tawas Independent Workers Association (the Union), and deal directly with Tawas. The complaint also alleges that Tawas violated Section 8(a)(3) and (1) by discharging Loeffler because she assisted the Union, engaged in concerted activity, and to discourage employees from engaging in similar activities. Tawas has denied these allegations.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Tawas, I make the following

FINDINGS OF FACT

I. JURISDICTION

Tawas, a corporation, manufactures filters for the automotive industry at its facility in Tawas City, Michigan, where it annually sells and ships products, goods, and materials valued in excess of $50,000 directly to points outside the State of Michigan. Tawas admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, and Tawas denies, that the Union, is a labor organization within the meaning of Section 2(5) of

[1] All dates are in 1994, unless otherwise indicated.

the Act.[2] The record demonstrates that the Union exists for the purpose of dealing with Tawas concerning grievances, wages, rates of pay, hours, and conditions of employment. Thus, the Union and Tawas are parties to a written collective-bargaining agreement, effective from October 1, 1993, until September 30, 1996. Under that agreement, Tawas recognizes the Union as the exclusive collective-bargaining representative of its production employees at its Tawas City facility. The agreement covers wage rates, hours of work, fringe benefits a grievance procedure, union dues checkoff, other conditions of employment, and has a union-security provision. The record also shows that the Union filed a grievance on Loeffler's behalf on March 31, 1995, alleging that her discharge violated the collective-bargaining agreement. Finally, the testimony of employees Loeffler and Emily South, shows that Tawas' employees participate in the Union as officers and stewards. I find from these facts that the Union is a labor organization within the meaning of Section 2(5) of the Act. *Yale New Haven Hospital*, 309 NLRB 363, 364 (1992).

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Margaret Loeffler's Discharge*

1. The facts

When Tawas' chairman, Raymond Allen, and its President Gary Holley acquired it on October 15, 1992, the Union was the exclusive collective–bargaining representative of the production employees at its Tawas City facility. At that time, Tawas and the Union were parties to a collective-bargaining agreement covering the bargaining unit. In 1993, Tawas and the Union executed the current collective-bargaining agreement, effective from October 1, 1993, until September 30, 1996, covering the same production employees. Allen, Holley, and Plant Manager Larry Hughes signed the agreement for Tawas.

When Allen and Holley acquired Tawas, employee Willard Rempert was the Union's president. Allen dealt with President Rempert ''a couple of times.'' According to Allen, Rempert approached him on those occasions with ''[s]mall things he wanted to talk about, but no major things.''

Rempert's successor as union president, employee Emily South, signed the current collective-bargaining agreement with Tawas. South remained president of the Union until the summer of 1994.

At the trial, Tawas' counsel asked Allen to explain how he resolved problems involving the collective-bargaining agreement and whether he dealt directly with plant employees. Allen answered:

> We have an open door policy. We're on the floor all the time. That's what's unique about Tawas Industry, the people. Gary [Holley], Larry [Hughes], myself, we can go on the floor and work with the people, and, yes they come up to you and talk to you. And you can resolve the problems right on the floor.

Under further direct examination, Allen testified, in substance, that President South administered the contract in the same manner as Rempert had. Allen testified: ''We had no problem with Emmie. It was the same working relationship.'' Allen further testified, in substance, that there were no terminations during Rempert's and South's respective tenures as the Union's president and that no reprimands were grieved during the same period.

The contract includes in its article XVII, entitled ''Discipline and Discharge,'' lists of offenses and disciplinary measures. Section 3B, and section 4N of that article, under ''Major Infractions'' and ''Intolerable Infractions,'' prohibit:

> Soliciting, collecting contributions, circulating petitions, or distributing literature for any purpose without permission or in any manner interfering with production or the maintenance of discipline.

According to Allen's testimony, Tawas has made unilateral changes in wages, hours, and conditions of employment since 1993. In that year, Tawas gave a $500 bonus to its bargaining unit employees, and surprised them with a $1000 bonus at the end of 1994. Tawas has given its plant employees the week off between Christmas and New Years, with pay. Also, Tawas has installed a third shift for its bargaining unit employees. According to Allen, Tawas has upgraded its employees' health care package. Allen testified: ''We have a drug and alcohol policy that we have implemented, and no, we didn't go through the union.'' A final item in Allen's array of unilateral changes was a dress code for Tawas' plant employees.

Tawas hired Loeffler in 1987 as a production laborer and laid her off in November 1992. Tawas reinstated her as a production employee on March 11. However, Loeffler was interested in switching to an office position. In a letter to Chairman Allen, dated May 5, Loeffler expressed interest in switching to Tawas' office. In a questionnaire, 10 days later, which Tawas had asked her to complete, Loeffler wrote that she expected to be promoted to a position in the office or in the personnel department. She also submitted a resume in which she expressed interest in an office position. Tawas did not respond to her request. Thus, until her termination on March 30, 1995, Loeffler worked for Tawas as a production employee.

In the summer of 1994, Emily South, having decided against another term as the Union's president, put up a notice at the Tawas plant asking for volunteers to sign up as candidates for the union offices of president, vice president, treasurer, secretary, and steward. Loeffler was the only employee to signed up for the union presidency. Each of the other offices had only one candidate. More than one employee signed up to be a steward. South, 2 weeks later, congratulated Loeffler as the Union's new president. At the same time, employee Brian Kaiser became the Union's vice president, employee Karen Cochran was the new secretary, and employee Estilita Kaiser became the Union's treasurer. Neither Loeffler nor any other member of the Union provided Tawas with written notification of any change in the Union's officers and stewards, as required by article II, section 2 of their current collective-bargaining agreement.

[2] Sec. 2(5) of the Act provides:

> The term ''labor organization'' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

However, Loeffler made her status as the Union's president known to Tawas' management. Immediately on becoming the Union's president, Loeffler, together with the new union secretary, Cochran, went to the plant office and introduced themselves in their new capacities to President Holley and Plant Manager Hughes. Later, in August, Loeffler approached Chairman Allen and obtained his permission to hold a union meeting between shifts.

On the following Saturday, Loeffler held a union meeting. One of the topics at this meeting was an invitation to attend a meeting at a local plant. Loeffler told the assembled employees that a Teamsters representative would be at that meeting, and asked if anyone was interested in attending.

Approximately 1-week later, Loeffler met with Allen, Holley and Hughes to exercise her preferential seniority rights to move from the plant's third shift to the first shift. According to the pertinent portion of article IV, section 7 of the current collective-bargaining agreement between Tawas and the Union, ''Preferential seniority will be given to the President of the Union who will head the seniority list so long as he/she remains President.'' However, Plant Manager Hughes denied Loeffler's request on the ground that her preferential seniority only protected her against layoff.

During this meeting, Allen said he understood that Loeffler had approached the Teamsters. She denied this assertion, explaining that the Teamsters had approached the employees and invited them to a meeting.

Allen asked Loeffler if she knew how the Union started at Tawas. Loeffler said no. Allen explained that the former owner, Elmer Worth, 30 or 40 years ago, initiated the Union himself to obtain business from the big three automobile manufacturers. Allen warned that he would move or close the plant if he could not have total control. Loeffler called Allen's remarks ''an illegal statement.'' Allen replied: ''You believe what you want to believe, I'll believe what I want to believe.''

By letter dated August 31, Loeffler asked Allen to assign her to the third shift during a reorganization of Tawas' production shifts. Loeffler received the requested assignment. However, Tawas ultimately eliminated the third shift and she ended up on the second shift.[3]

In September or October, Tawas held a meeting at its plant with the second shift, regarding some tampering with machinery on that shift. Also present were Loeffler, Hughes, Holley, and Allen. Loeffler said something on the Union's behalf. Chairman Allen responded: ''As I said many times before, I have no use for the union.''

Loeffler protested. She said, ''Excuse me, are you telling us that you signed an agreement, a labor agreement between Tawas Industries and the union and you didn't sign it in good faith.''

Allen reacted by asking the assembled employee, ''How many people want to work here?'' All the employees, except Loeffler, raised their hands. Allen remarked: ''Margaret doesn't want to work here.''[4] I also find from former employee Brian Kaiser's testimony, that Allen warned the employees that if the recent union activity did not cease, he, Allen, would move the plant, or fire all the employees and replace them, or simply close the plant entirely.[5]

Sometime in November, Tawas asked its employees to fill out employment applications which included the following provision:

> I understand that just as I am free to resign at any time, the employer reserves the right to terminate my employment at any time, with or without cause and without prior notice. I understand that no representative of the employer has the authority to make any assurances to the contrary.

Responding to Tawas' request for new employment applications from its plant employees, Loeffler posted a notice on a plant bulletin board advising them that:

> An attorney ''will be reviewing our contract and his advice at this time is: Do not sign this application unless you *cross out* the quoted section, have it witnessed, initial it with your own initials then have your witness sign it and date it also. Keep a xerox copy for your own records.''

In the same notice, Loeffler asserted that so far, the attorney had rendered this advice at no cost to the Union.

On November 29, Allen posted a memorandum responding to Loeffler's notice. The memorandum did not name Loeffler, but began: ''I was distressed to see an employee of Tawas Industries felt the need to consult an attorney regarding our recent request to complete an employment application.'' The last paragraph of Allen's memorandum declared:

> I am concerned and disappointed that there are a few unhappy people trying to cause problems. You can choose to read propaganda such as was posted, and fol-

[3] I based my findings regarding Loeffler's shift changes on her testimony, her letter of August 31 to Chairman Allen, and on his testimony that he complied with the request in that letter.

[4] Allen denied saying ''Margaret doesn't want to work here.'' His denial came in response to a leading question after he had provided his recollection of the incident. Yet, earlier in the day, when asked about this meeting, Allen testified that he could not remember asking the employees, who wanted to work at Tawas, to raise their hands. President Holley testified that Allen, asked the assembled employees to raise their hands if they were happy working for Tawas and that Loeffler was the only employee who did not raise her hand. Counsel did not give Holley an opportunity to testify about whether Allen said that Loeffler did not want to work at Tawas. Plant Manager Hughes, in response to leading questions by Tawas' counsel, agreed that he had attended a meeting at which Allen asked employees to raise their hands if they were happy and that Loeffler did not raise hers. Hughes also agreed that Allen said nothing to her directly and did not comment about her failure to raise her hand. However, as Leoffler gave her testimony regarding this incident in a full and forthright manner and seemed more certain of the details, I have credited her version of this incident.

[5] President Holley testified that to his knowledge, Allen did not voice the warnings attrbuted to him by Kaiser. Holley also testifed that he did not remember what Allen said at this meeting. Allen, in response to leading questions, denied ever making such remarks in a meeting, in the presence of union member or union officials. Plant Manager Hughes, in response to leading questions, did not recall any such comments at the meeting referred to in Kaiser's testimony. However, he was not given any opportunity to provide testimony showing that he remembered what was said at that meeting. In contrast with Holley, Allen, and Hughes, Kaiser seemed to have a firm recollection of what was said at this meeting and testified in a straightforward manner. Accordingly, I have credited his testimony regarding Allen's warnings.

low these people who have nothing to offer, or you can choose to discuss your concerns with management and understand the truth.

Loeffler posted the following memo at Tawas's plant on December 2:

Dear Union Member:

The attorney I showed the application to was in his words to me ''delighted to hear that I ruffled some feathers.'' He also found it interesting that they have backed down from their insistence in filling out the application. Also the misleading information did not and has never came [sic.] from me. He congratulated me for the guts to stand up for the people in here and their rights as employees under the union contract and stands firm in his statement that the application does take precedence over the contract.

Enough said.

In early December, Loeffler posted her resignation as president, on the Union's bulletin board. Within a day or two, Loeffler changed her mind and wrote ''cancelled'' on her resignation.

Loeffler had wanted to resign because she was troubled by her dealings with Allen on behalf of the Union. On one occasion, when she raised questions about rumors she had heard in the plant, Allen told Loeffler she had ''garbage can ears,'' because she listened to gossip. On the same occasion, Allen said that Loeffler had a ''chip on [her] shoulder.'' During other contacts with Allen, including the discussion of her shift change request in August, he told Loeffler that she had an attitude problem. Loeffler was also troubled by Allen's threats to close or move the plant, which he made to her twice in the context of their discussions of union concerns.[6]

In January 1995, Loeffler went to the plant office and complained to Allen that there were some employees who had completed their 90-day probationary period and wanted their names added to the seniority list. Loeffler also complained that Emily South's name was at the top of seniority list, and asked that her own name be put there, instead. Finally, Loeffler told Allen that some of the newer employees had not received a copy of the union contract. Allen told his secretary, who was nearby, to take care of these matters.

Loeffler's complaints reflected her knowledge of the collective-bargaining agreement. As previously noted, article IV, section 7 of the agreement required placement of her name at the top of the seniority list. Under article IV, section 3 of the agreement, ''New employees shall be regarded as probationary employees for ninety (90) calendar days after being hired, during which time they shall not be entitled to a place on the seniority list.'' The same section also provides that on completion of the probationary period, ''the employee's name shall be added to the seniority list, with the employee's seniority date being their most recent date of hire.'' Under section 6 of the same article, Tawas ''agrees to recognize seniority in the selection of shifts for employees covered under this agreement.''

Soon thereafter, Tawas posted a new seniority list showing the two new employees. However, Emily South headed the list. Also, Loeffler noted that Tawas did not provide the requested copies of the agreement to the new employees.

In January or February 1995, Tawas directed its plant employees to discontinue their practice of using the last 5 minutes of their shift to cleanup and washup. Instead, Tawas directed them to remain at work, on the production line, until the next shift arrived to continue production.

Loeffler and her fellow employees conferred. Loeffler reminded them that the current collective-bargaining agreement provided a 5-minute period for machine cleanup and washup. All agreed that they would adhere to the 5-minute cleanup and washup provision in the contract.

Later, in the same morning, Supervisor Alita Wingrove, reminded Loeffler and her colleagues of the new rule regarding the last 5 minutes of their shift. Loeffler told Wingrove that she and the other employees intended to adhere to the contract. Loeffler told Supervisor Wingrove, ''If there's any problems, you can send them to me.''

The next thing Loeffler knew, she was directed to a confrontation with Plant Manager Larry Hughes about the 5-minute provision and the new rule. Hughes said he understood from Wingrove that Loeffler had instructed the employees to walk off the production line 5 minutes early. Loeffler explained that she had told the employees that she intended to follow the contract and had advised them to do as they wished. Hughes said it was disappointing and distressing to hear that employees are encouraging such behavior.

On March 27, 1995, Loeffler telephoned Tawas' office. She spoke to secretary Debbie Boughner, telling her about South's name on the top of the seniority list and suggesting the removal of the names of two or three former employees. Boughner said she would look into it. As far as Loeffler knew, her requests remained unfulfilled.

However, I find from President Gary Holley's uncontradicted testimony that prior to Loeffler's discharge, Tawas issued a seniority list with Loeffler's name on top of it. The record did not disclose the issuance date. Nor was there any showing that Tawas had ever posted it. I also find from his testimony, that Holley knew, at the time of the hearing before me, that a supervisor had a copy of this list.

Loeffler, 2 days later, telephoned Boughner to complain that a new seniority list had not appeared. Boughner replied that Allen and Holley had instructed her to tell Loeffler that if she had any questions, she must deal directly with them. Loeffler became irate and hung up, saying, ''You can tell them from me that this is bullshit.''

On the following day, Loeffler prepared and signed the following notice and posted it at Tawas' plant:

DATE: March 29, 1995

[6] Allen did not dispute Loeffler's account of his remarks to her about ''garbage ears'' or about having a chip on her shoulder. President Holley did not contradict Loeffler's credible testimony regarding Allen's remarks to her. Holley testified that he did not remember Allen remarking about ''a chip on her shoulder.'' Nor did Holley remember any remark about Loeffler's attitude. Hughes did not remember what the meeting was about and had only a sketchy memory of Allen's remarks. In response to leading questions, Hughes denied that Holley or Allen said anything about Loeffler's attitude or that she had a chip on her shoulder. However, as Loeffler impressed me as being a sincere witness, giving her best recollection in an objective manner, I have credited her testimony regarding Allen's remarks to her.

TO: Union members
FROM: Margaret
SUBJECT: Senority [sic]

Dear Members:

On Monday, March 27, I made a telephone request to Debby and asked her to update the seniority list by putting my name at the top of the list and to remove 2 employees no longer in the union. On Wednesday I was informed that if I have any questions I must direct them to Ray or Gary. This list has been incorrect for a long period of time and unless I am mistaken I am union president. I cannot understand why management has not taken this list down themselves and corrected it. Perhaps they don't want to acknowledge me as union president? You will recall that when the recently hired employees became eligible to enter the union a new list was put on the board (at my request) [sic]. How many months ago was that? And they still can't put me at the top [sic] at the list without making an issue out of it. They continue to harass and discriminate against me.

On March 30, 1995, Loeffler went to work at Tawas, on the night shift. At the begining of the shift, Supervisor Campbell told Loeffler to go to the office. Accompanied by two union officers, Loeffler went to the office, where she met with Allen, Holley, Hughes, and Supervisors Campbell and Wingrove. President Holley stated that as of that day, Loeffler's employment at Tawas was terminated because of the letter she had posted, which violated the following provision in the collective-bargaining agreement.[7]

ARTICLE XVII—DISCIPLINE AND DISCHARGE

. . . .

Section 4. Intolerable Infractions

Penalty: Up to and including discharge on the first offense. No previous warning has to be issued.

. . . .

G. Making false, vicious, or malicious statements concerning any employee, the Company, or its products.

Holley asked Loeffler if she had anything to say. She answered no, but added: ''[B]ut you should know that this is the best thing that could happen to me and the union.'' On March 31, Loeffler filed a grievance alleging that her discharge was wrongful. This attempt to gain reinstatement failed. Tawas has not offered reinstatement to Loeff

2. Analysis and conclusions

The General Counsel contends that Tawas violated Section 8(a)(3) and (1) of the Act when it discharged Loeffler in retaliation for her activity on the Union's behalf. Tawas seeks to avoid a finding that its treatment of Loeffler violated those provisions of the Act by showing that her misconduct was the sole reason for her discharge. According to Tawas' brief, Loeffler was disgruntled because Tawas did not satisfy her request for an office position, and proceeded to engage in misconduct designed to cause Tawas to discharge her.

Under Board policy, if the General Counsel makes a prima facie showing that Tawas' hostility toward Loeffler's union activity was a motivating factor in the decision to discharge her, the discharge will be found to be unlawful unless Tawas shows, as an affirmative defense, that it would have discharged her even in the absence of the protected activity. *NLRB v. Transportation Management Corp*., 462 U.S. 393, 402–403 (1983), affg. *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Accord: *NLRB v. C.J.R. Transfer, Inc*., 936 F.2d 279, 283 fn. 3 (6th Cir. 1991). If the record shows that the business reason or reasons which Tawas has given to explain its decision to discharge were a pretext—that is, that the reason or reasons do not exist or were not in fact relied on—it necessarily follows that Tawas has not met its burden and the inquiry is logically at an end. *Wright Line*, supra at 1084.

Tawas' management under Allen and Holley had no trouble with the Union, until Loeffler came on as the Union's president. Loeffler's predecessors, Rempert and South did not annoy Allen or Holley. Allen testified that Rempert approached him with ''[s]mall things he wanted to talk about, but no major things.'' South signed the current collective-bargaining agreement between Tawas and the Union. Allen's testimony also shows that South was as easy to get along with as was Rempert. She did not interfere with Tawas' efforts to deal directly with the bargaining unit employee.

Since coming to Tawas, Allen and Holley have maintained ''an open door policy.'' According to Allen's testimony, he, Holley, and Plant Manager Hughes are on the production floor ''all the time,'' the employees come to them and talk, and the three ''can resolve the problems right on the floor.'' The Union is not included in the resolution of these problems.

Tawas' management has also disregarded the Union with respect to changes in wages, hours, and conditions of employment. In testimony before me, Allen admitted awarding bonuses to the production employees, giving them a 1-week holiday with pay, installing a third shift for them, changing their health care benefits, and imposing a dress code on them, all without consulting the Union. Allen also testified that Tawas developed and implemented a drug and alcohol policy ''and no, we didn't go through the union.'' Presidents South and Rempert did not create any discord in the face of these unilateral actions.

In the summer of 1994, when Loeffler became president of the Union, she lost no time in letting Tawas' management know about it. The Union did not provide the written notice of her accession to that office. However, she made her status known by visiting the plant office and presenting herself as the Union's president, to President Holley and Plant Manager Hughes. Later, in August, Loeffler approached Chairman Allen and obtained his permission to hold a union meeting, between shifts. Allen treated Loeffler's request for time to have a meeting as a request from the Union's president.

[7] Loeffler testified that Holley included her remarks to Debbie Boughner on the previous day as a reason for the discharge. However, Allen, Holley, and Hughes testified that they decided to discharge Loeffler because of her false and malicious assertion in her notice that: ''They continue to harass and discriminate against me.'' As these three members of managment participated in the decision, and gave this testimony in a frank manner, I have credited their testimony in this regard.

After Loeffler succeeded South as the Union's president, the climate between the Union and Tawas' management changed. Soon after assuming office, Loeffler told her fellow union members of an opportunity to attend a meeting at which a Teamsters representative would be present. Allen heard that Loeffler had approached the Teamsters. When Allen said he understood that she had gone to the Teamsters, Loeffler denied that she had done so.

Not content to let the matter drop, Allen explained to Loeffler that Tawas' former owner had established the Union as a ploy to obtain business from the three major automobile manufacturers. Continuing, Allen revealed his hostility toward the procedure of collective bargaining. Thus, he warned that he would move or close the plant if he could not retain total control.[8]

Immediately, Loeffler told Allen that his warning was ''an illegal statement.'' Allen rejected Loeffler's assessment of his remarks, replying: ''You believe what you want to believe, I'll believe what I want to believe.''

At a meeting between management and the second shift, Loeffler provoked Allen when she said something on the Union's behalf. Allen responded: ''As I said many times before, I have no use for the union.''

Whereupon, Loeffler, in front of Tawas' senior management, and the second shift's production employees, asked Allen: ''Excuse me, are you telling us that you signed an agreement, a labor agreement between Tawas Industries and the union and you didn't sign it in good faith?''

At this point, Allen's hostility toward Loeffler's question surfaced. He asked the assembled employees to raise their hands if they wanted to work at Tawas. When all except Loeffler did so, he remarked: ''Margaret doesn't want to work here.''

Allen's subsequent remarks showed that Loeffler's union meeting, and her efforts to cause Allen to deal with the Union as the production employees' bargaining representative were annoying him. He warned that if the recent union activity did not cease, he would impose economic reprisals, including moving the plant, discharging all the employees and replacing them, or closing the plant.[9]

Undaunted, Loeffler defied Allen in November, when Tawas directed the plant employees to complete employment applications which included language recognizing that Tawas could discharge the employee ''at any time with or without cause and without prior notice.'' She posted a notice in the plant advising the employees to ''cross out'' the entire section including the quoted language before signing the application.

On November 29, Allen issued and posted a memorandum to the plant employees responding to Loeffler's notice to the plant employees. In its first sentence, Allen's memo left no doubt that he was piqued by her resort to an attorney to determine if the bargaining unit employees had a right to cross out the objectionable language in the application. Allen's hostility carried over to the last paragraph of his memo, where he expressed concern and disappointment ''that there are a few unhappy people trying to cause problems.'' In the context of the rest of his memo, Allen considered Leoffler an unhappy person ''trying to cause problems.''

The last paragraph of Allen's memorandum offered the employees a choice between following ''these people who have nothing to offer'' or ''discus[sing] your concerns with management.'' This suggestion was an invitation to the plant employees to abandon the Union as their representative and to deal directly with Allen and his colleagues in management. Thus did Allen once again manifest hostility toward collective-bargaining with the Union. I find that by Allen's suggestion, Tawas interfered with, restrained, and coerced its employees in the exercise of their right under Section 7 of the Act to bargain collectively through the Union, and thereby violated Section 8(a)(1) of the Act. *Mark Twain Marine Industries*, 254 NLRB 1095, 1102 (1981).

On December 2, Loeffler followed up her attack on the application with a boastful memorandum which she posted at Tawas' plant. In the first sentence, she reported that an attorney, who had seen the application was ''delighted to hear that I ruffled some feathers.'' Continuing, Loeffler reported that Tawas was no longer seeking a new employment application and that the same attorney had congratulated her for here courageous stand on behalf of the bargaining unit. She concluded with the attorney's advice that the application would take precedence over the collective-bargaining agreement.

Allen's memorandum of November 29 showed that he was alert to Loeffler's actions as the Union's president. It also showed that Loeffler's opposition to Tawas' request for a new employment application from the plant employees troubled him. I am thus led to find that Loeffler's posted memo of December 2 further aggravated Allen.

It was Allen's animosity toward her, which caused Loeffler to consider resigning as union president in early December. Allen's hostility to her union activity surfaced in their confrontations. When Loeffler asked about some rumors she had heard on the plant floor, he rebuked her. He said she had ''garbage can ears'' and ''a chip on her shoulder.'' On other occasions, Allen accused Loeffler of having an attitude problem. Twice, in 1994, while she was discussing union concerns with him, Allen threatened to close or move the plant.

In January 1995, Loeffler sought to enforce the collective-bargaining agreement. She insisted that Tawas comply with article IV, section 7 of the agreement, which required that her name be placed at the top of the plant seniority list. She also pressed Tawas to honor its obligation under article IV, section 3 to place the names of two employees on the seniority list, as they each had completed the prescribed 90-day probationary period. She complained that Emily South's name remained atop the seniority list and that there were some employees, who had completed the probationary 90 days, and were not shown on the seniority list. She also asked Tawas to give copies of the collective-bargaining agreement to those of the new employees who had not received one. In Loeffler's presence, Allen told his secretary to take care of these matters.

[8] Allen's threat to move or close the plant did not occur within the 6-month period of limitations provided in Sec. 10(b) of the Act. Thus, I cannot rely on these remarks to find a threat violative of Sec. 8(a)(1) of the Act. However, I shall rely on them only to shed light on Tawas' reasons for discharging Loeffler. *3 State Contractors*, 306 NLRB 711, 716 (1992).

[9] Again, Allen's threats at the second shift meeting did not occur within the 6-month period of limitation provided in Sec. 10(b) of the Act. Accordingly, I have not relied on these remarks to establish violations of the Act but only to shed light on Tawas' decision to discharge Loeffler. *3 State Contractors*, supra,.

Soon after Allen had directed his secretary to take care of Loeffler's requests, a new seniority listed appeared with the two new employees' names included. However, Loeffler noted that Emily South headed the list and the requested copies of the collective-bargaining agreement had not materialized.

In January or February 1995, Loeffler exercised a leadership role in the Tawas plant employees' defiance of management's attempt to discontinue unilaterally the 5-minute cleanup and washup period, which they enjoyed under the contract. When Supervisor Wingrove attempted to enforce the requirement that the employees remain on the production line for the last 5 minutes of their shift, Loeffler intervened on behalf of the employees. Loeffler said she and the other employees would adhere to the contract and use the last 5 minutes of their shift to cleanup and washup. This response led to a confrontation with Plant Manager Hughes, who was irked by Leffler's effort to enforce the contractual 5-minute cleanup and washup rule.

On March 27, 1995, Loeffler approached Allen's secretary, Boughner, and complained that Emily South's name remained atop the seniority list. Loeffler also recommended removal of the names of two or three former employees from the list. Loeffler contacted Boughner, 2 days later, and complained that Tawas had not issued a new seniority list. Boughner told Loeffler to take her questions directly to Allen and Holley. Loeffler was incensed by this reply and ended the conversation with: ''You can tell them from me that this is bullshit.''

On the day after her second encounter with Boughner, Loeffler posted the notice quoted above at pages 8 and 9. The final sentence of Loeffler's notice was: ''They continue to harass and discriminate against me.'' The notice, addressed to the Union's members, publicized Loeffler's complaint that management's apparent failure to comply with her requests to put her name at the top of the seniority list, as required under the collective-bargaining agreement, was but another instance of its effort to make her presidency uncomfortable for her. There is no evidence that Loeffler posted this notice with any expectation that her fellow union members would take any action to support her in this matter.

That same day, Tawas discharged Loeffler for making a false and malicious statement, when she complained of harassment and discrimination in her memo of March 29, 1995. Holley, who imposed the discharge, invoked section 4, article XVII of the collective-bargaining agreement, which permits Tawas to discharge employees for: ''Making false, vicious or malicious statements concerning any employee, the Company, or its products.''

In sum, I find that the General Counsel has made a strong showing that Loeffler's union activity motivated Tawas' decision to discharge her. Thus, the record shows that Loeffler's actions as the Union's president included continuing efforts to enforce the collective-bargaining agreement. Such efforts constituted union activity protected by Section 7 of the Act. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 701, 703 (1983). The record also makes clear that Tawas' management, particularly Chairman Allen, was openly hostile to Loeffler's union activity. Surely the timing of Tawas' decision to discharge her on the very day she posted her notice to the Union's membership strongly suggests that her union activity provoked it.

Tawas contends that its discharge of Loeffler did not violate the Act because union activity played no part in the decision to do so. Instead, Tawas claims that Loeffler's false and malicious statement in her notice to the union members, dated March 29, 1995, provoked Tawas to discharge her. According to Tawas, Loeffler's allegations of harassment and discrimination violated the collective-bargaining agreement's prohibition against ''false, vicious, or malicious statements concerning [Tawas].''

At the hearing before me, Tawas introduced testimony of Allen, Holley, and Hughes to support its contention that Loeffler's allegations of harassment and discrimination were false and malicious. However, their testimony did not go beyond a denial of these accusations. In contrast, Loeffler's credited testimony showed that she felt harassed by Allen's assertions that she had ''garbage can ears'' and had a ''chip on [her] shoulder.'' Her credited testimony also showed that she considered Allen's warnings about closing the plant, if he could not maintain control, to be a form of harassment. Coming in the context of her dealings with management as the Union's president, these warnings and Allen's expressed disrespect for the Union made Loeffler feel uncomfortable, to the point that she prepared and briefly posted her resignation from the Union's presidency. I find that Loeffler had reason to feel harassed by Allen.

Loeffler's unsuccessful efforts to have her name at the top of the seniority list provided ground for her complaint of discrimination. After all, the collective-bargaining agreement required Tawas to do so, and Tawas had accorded that privilege to her immediate predecessor.

Tawas' assertion that Loeffler's allegations were malicious was not substantiated in the record before me. According to Tawas' brief, Loeffler was embittered by its refusal to grant her request for an office position and went out of her way to provoke management. However, there was no showing that Loeffler harbored any resentment against Tawas or its management because of that refusal.

In sum, I find that Tawas' management seized on Loeffler's complaint of harassment and discrimination as a pretext for putting an end to her efforts to pressure Tawas into abiding by the collective-bargaining agreement. Thus, I further find that by discharging Loeffler because of her activity as the Union's president, Tawas violated Section 8(a)(3) and (1) of the Act. *Howard Electric Co.*, 285 NLRB 911, 913 (1987).

I also find, as urged by the General Counsel, that the rule, on which Tawas relied as excuse for Loeffler's discharge, violated the Act. The Board has recognized that:

> [S]uch a rule, because it prohibits and punishes the merely false, as opposed to the malicious, or vicious, is . . . unlawful per se, because Section 7 of the Act protects merely inaccurate employee statements. The rule runs afoul of the fact that these false statements may well relate to concerted activities. Thus, the rule violates Section 8(a)(1) of the Act. [Citations omitted. *Independent Stations Co.*, 284 NLRB 394, 397 (1987).]

That Tawas and the Union maintained the rule in their collective-bargaining agreement does not cure its infringment upon the bargaining unit employees' Section 7 rights. For under Board law, the Union, by agreeing to the inclusion of

that rule in the collective-bargaining agreement, ''could not waive the employees' right to protected communications.'' *Universal Fuels*, 298 NLRB 254, 257 (1990). Accordingly, I find that by maintaining section 4G of article XVII in its collective-bargaining agreement with the Union, as quoted above, Tawas has violated Section 8(a)(1) of the Act.

I further find that Tawas enforced the unlawful rule against Loeffler in reprisal for her union activity. Accordingly, I find that by this conduct, Tawas discriminated against Loeffler in violation of Section 8 (a)(3) and (1) of the Act. *Rooney's at the Mart*, 247 NLRB 1004, 1012 (1980).

B. *The Restriction on Solicitation and Distribution*

The current collective-bargaining agreement between Tawas and the Union includes the following provision:

> ARTICLE XVII—DISCIPLINE AND DISCHARGE
>
> . . . .
>
> Section 4. Intolerable Infractions
>
> Penalty: Up to and including discharge on the first offense. No previous warning has to be issued.
>
> . . . .
>
> N. Soliciting, collecting contributions, circulating petitions, or distributin [sic] literature for any purpose without permission or in a manner interfering with production or the maintenance of discipline.[10]

The General Counsel contends, and I agree, that under Board policy, the quoted restriction violates Section 8(a)(1) of the Act. I find this rule, on its face, overly broad, i.e., it is not restricted to working time. Under Board law, such a rule is presumptively unlawful. *Our Way, Inc*., 268 NLRB 394 (1983). However, Board policy would permit Tawas to avoid the finding of a violation in the instant case by showing through extrinsic evidence that it communicated the rule to its employees or applied it so as to show an intent to permit solicitation and distribution during breaktime or other periods when employees are not actively at work. *Our Way*, supra at 395 fn. 6, citing *Essex International*, 211 NLRB 749, 750 (1970).

Tawas has not shown that it told its employees that solicitation and distribution during nonworking time was permitted. Nor has Tawas shown, with respect to the ''distribution'' portion of its rule that it permits distribution in nonwork areas of its plant.

Accordingly, I find that Tawas has failed to show that the rule meant anything other than a prohibition of all solicitation and distribution. Therefore, I find that Tawas has violated Section 8(a)(1) of the Act by maintaining an overly broad rule against solicitation and distribution in its current collective-bargaining agreement with the Union. *MTD Products*, 310 NLRB 733 (1993).

[10] A similar provision appears as a major infraction in sec. 3B of art. XVII of the current collective-bargaining agreement between Tawas and the Union.

CONCLUSIONS OF LAW

1. By discharging Margaret Loeffler on March 30, 1995, for acting in her capacity as president of the Union, Tawas Independent Workers Association, a labor organization within the meaning of Section 2(5) of the Act, Respondent, Tawas Industries, Inc., has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

2. By maintaining the following rule in its collective-bargaining agreement with the Union, and Respondent has violated Section 8(a)(1) of the Act:

> ARTICLE XVII—DISCIPLINE AND DISCHARGE
>
> . . . .
>
> Section 4. Intolerable Infractions
>
> Penalty: Up to and including discharge on the first offense. No previous warning has to be issued.
>
> . . . .
>
> G. Making false, vicious, or malicious statements concerning any employee, the Company, or its products.

3. By enforcing article XVII, section 4G of its collective-bargaining agreement against employee Margaret Loeffler for acting in her capacity as president of the Union, Respondent violated Section 8(a)(3) and (1) of the Act.

4. By posting a notice suggesting that its employees bypass the Union and deal directly with management, Respondent violated Section 8(a)(1) of the Act.

5.By maintaining a rule in two provisions of its collective-bargaining agreement with the Union, which prohibits the following conduct by employees, Respondent has violated Section 8(a)(1) of the Act:

> Soliciting, collecting contributions, circulating petitions, or distributin [sic] literature for any purpose without permission or in a manner interfering with production or the maintenance of discipline.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employee Margaret Loeffler, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I shall also recommend that Respondent be required to remove from its files any references to the discharge which I have found violative of the Act, as set forth above, and notify employee Loeffler, that it has done so and that it will not use this discharge against her in any way.

[Recommended Order omitted from publication.]